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IN THE

Supreme Court of the United States

October Term, 1975

No. 75-9721

Herbert Mildner, *Appellant,*
vs.

FRANK A. GULOTTA, individually and as Presiding Justice,
Appellate Division of the Supreme Court of the State of
New York, Second Judicial Department, *et al.*,
Appellees.

**On Appeal from the United States District Court
for the Eastern District of New York**

JURISDICTIONAL STATEMENT

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January 7, 1976

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HERBERT MILDNER,

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On Appeal from the United States District Court for the Eastern District of New York

JURISDICTIONAL STATEMENT

Introduction

This jurisdictional statement

is submitted on behalf of appellant, Herbert Mildner, an attorney-at-law who by this proceeding has challenged, on constitutional grounds, the procedure in New York State for disciplining attorneys. The appeal is from an order of a three judge United States District Court, sitting in the Eastern District of New York, convened pursuant to 28 U.S.C. §2281. By that order, a divided court refused to grant appellant's request for a preliminary and permanent injunction against the use of the New York State disciplinary procedure and his request for a declaration that such procedure was constitutionally infirm. Said order dismissed appellant's complaint.

This jurisdictional statement is

submitted pursuant to Rule 15 of the Rules of this Court. There is also submitted herewith, under separate cover, an appendix containing the opinions and order below and other opinions and documents relevant to this jurisdictional statement.

There is no doubt that the questions presented in this case are serious. Thus, Judge Moore, the Chief Judge in the Court below, specifically stated that the constitutional question posed was "of sufficient importance to be resolved by our highest court." Judge Neaher, although finding the constitutional claims to be without merit, and desiring to abstain from interfering with New York State's attorney disciplinary proceedings, still joined in the order which

stayed the suspension of appellant pending disposition of the appeal from the three judge Courts' order because he felt that "serious procedural and substantive issues are presented,...." In addition, Judge Weinstein considered the appellant's claim so serious that he agreed with the claim that the New York State attorney disciplinary procedure was unconstitutional, in that it deprived appellant of both due process and equal protection of the law.

Appellant's claim arises on account of his suspension from the practice of law by the New York State Supreme Court, Appellate Division, which suspension resulted despite a Referee's findings that the charges against Appellant had

not been sustained.

The basis of appellant's claim challenging the constitutionality of New York State's statutory procedure for disciplining attorneys is first that attorneys, unlike all other New York professionals, have no appeal as of right from an original determination that they should be disciplined. All other professionals licensed to practice in the State of New York do have an appeal from any order of discipline, said appeal being as of right. In addition, all litigants within the State, other than disciplined attorneys, have at least one appeal as of right from any adverse determination. However, because of the

unique structure of New York State's procedure for disciplining attorneys, attorneys have only a limited right of appeal from any original determination disciplining them. Section 90 of the New York State Judiciary Law (Appendix D, 124a)* is the critical provision. The second ground raised by Appellant is the fact that the Referee who was appointed by the Appellate Division to hear the witness and arguments of counsel found that the charges against him were not sustained, and the Appellate Division summarily reversed the findings of that Referee, without giving any reasons there-

*Unless indicated otherwise, all numbers contained in parenthesis relate to the separately bound Appendix to Jurisdictional Statement.

for, and without benefit of any hearing or presentation of oral argument, denying him both due process and equal protection of the laws.

Judge Weinstein agreed with these contentions in the following language:

"The trier, Appellate Division, decides the facts without hearing the witnesses and without the opportunity to determine credibility by observing them testify; it denies counsel the opportunity to orally argue the merits of the case; and it fails to give reasons for its decision, even when it rejects the report of the Referees who have heard the witnesses." (Appendix A, 80a.)

Judge Weinstein further stated
that:

"The law also is unconstitutional in denying attorneys the equal protection of an appeal permitted all other professionals."
(Appendix A, 99a.)

The issues presented to the Court below, and sought to be presented to this Court, involve, as all three judges below agreed, substantial questions. They go to the very right of an attorney-at-law to practice his profession free from arbitrary, unreasonable and unconstitutional procedures for his discipline, including his potential suspension and disbarment. In this regard, it was not disputed that appellant is an attorney-at-law duly admitted to practice within the State of

New York whose sole income is from the practice of law and whose entire source of income would be terminated if his suspension by the Appellate Division be permitted to stand.

The three judge Court below was convened pursuant to an order of Judge Weinstein, dated October 23, 1974 (Appendix B, 107a). Subsequently, this case was consolidated with cases raising similar claims pursuant to an order dated March 12, 1975 (Appendix C, 121a).

As indicated infra, the three judges each rendered a separate opinion in the consolidated cases. Judge Neaher's opinion dismissed the complaint, holding both that the procedure challenged did not violate appellant's

constitutional rights and that the Federal Courts should not intervene in State disciplinary proceedings. Judge Moore held only that the challenged procedure was constitutional. Judge Weinstein, in a dissenting opinion, found that the challenged procedure was unconstitutional and that the Federal Courts should not abstain from so holding.

As indicated above, all three judges joined in the order to the extent that they unanimously agreed that the stay, which had been entered by Judge Weinstein, of the disciplining of each attorney, would be continued pending disposition of any appeals.

The cases consolidated with this case were Milton Levin v. Frank A. Gulotta,

(U.S.D.C., E.D. #74-C-1668) and Julius Gerzof a/k/a Julius M. Gerzof v. Frank A. Gulotta, (U.S.D.C., E.D. #74-C-1684).

Each of the three plaintiffs have filed Notices of Appeal to this Court and appellant Milton Levin has heretofor filed a jurisdictional statement with this Court. To the extent permitted by the rules of this Court (see, e.g., Rule 15, subdivision 3), it is respectfully requested that said jurisdictional statement of appellant Levin be considered as "covering" this case as well.

Reports of Opinions of the Court Below

The opinions of the Court below have not yet been reported. A copy of the Opinion and Order of the three-judge court, as well as a copy of the Opinion and Order of the Hon. Jack B. Weinstein convening the three-judge court, appear as Appendix A(1a) and Appendix B (107a) respectively, of the separate Appendix to Jurisdictional Statement.

The Nature Of the Proceeding And Statute
Pursuant To Which It Is Brought:

This is a civil rights action brought by an attorney who had been practicing law for more than 15 years in which he seeks to permanently enjoin the respondents (certain officials of the State of New York) from suspending him from the practice of law and for a declaration that the procedure for disciplining attorneys in the State of New York are constitutionally invalid. This action, brought pursuant to 42 U.S.C. §1983 and 28 U.S.C. §§1343 and 2201, is based on the appellant's claim that the disciplinary procedures adopted by New York State deny appellant his constitutional rights to due process and equal protection.

The Date Of The Order And Judgment
Sought To Be Reviewed, The Date Notice
Of Appeal Was Filed, And The Court In
Which It Was Filed:

The Order sought to be reviewed was dated and entered on the 9th day of October, 1975. The judgment was entered on the 16th day of October, 1975. The Notice of Appeal was filed on the 7th day of November in the office of the Clerk of the United States District Court for the Eastern District of New York.

The Statutory Provision Conferring On
The Court Jurisdiction Of The Appeal.

The statutory provision conferring jurisdiction on this Court is
28 U.S.C. §1253.

JURISDICTION OF THE COURT

As previously indicated, this is an appeal from an order of a three-judge district court dismissing the appellant's complaint on the merits. The complaint sought permanent injunctive and declaratory relief on the ground that the disciplinary procedures of the State of New York deny attorneys due process and equal protection of law as guaranteed by the Fourteenth Amendment of the United States Constitution (149a). Thus, in accordance with 28 U.S.C. §1253, this is a direct appeal from

"...an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any

Act of Congress to be heard and determined by a district court of three judges."

This appeal falls squarely within the rule recently enunciated by this Court in MTM, Inc. v. Basley, 420 U.S. 779 (1975). Thus, in MTM, this Court held that such appeals will lie, jurisdictionally, where

✓ "[T]he order [of the three-judge court] rests upon resolution of the merits of the constitutional claim presented below." 420 U.S. at 804.

Analysis of the determination below reveals not only that all three judges considered the merits but that the merits formed the very basis of the dismissal.

A substantial portion of Judge Neaher's opinion dealt with and sought to

resolve the merits of plaintiff's constitutional claim (17a-27a). In his concurring opinion, Judge Moore specifically stated

"...I would dismiss on the merits...for the reasons stated in Judge Neaheer's opinion." (34a).

Judge Weinstein, in dissent, would have granted appellant the relief sought on constitutional grounds. In granting a stay of the State suspension order pending appeals, all three judges acknowledged that "serious...substantive issues are presented." (33a).

To the extent, if any, that Judge Neaheer would have based dismissal on the abstention doctrine (27a-32a), there is no bar to the exercise of jurisdiction

by this court. In the first instance, Judge Neaher was alone in his statement that the federal courts should not intervene. In the second instance, as both Judges Neaher and Moore recognized, the interests of judicial economy would best be served by a final determination from this Court (32a, 37a). Thus, to require appellant to first present these issues to the United States Court of Appeals, which might well reject the one basis upon which it can hear the appeal - abstention - would be unduly burdensome. Finally, Judge Neaher's concurrence in the granting of a stay pending appeal would be totally inconsistent with a view that abstention is proper since the stay itself represents an interference

with the State's judicial mechanism. Judge Neaher's participation in the stay pending appeals is a recognition of his desire to have this Court review this matter. Otherwise he could have stayed the punishment of Appellant pending appeal to the U.S. Court of Appeals only. His choice not to do so, and his full consideration of the merits, shows that he decided this case on the merits and wanted this Court to do so. Thus, it is clear that the determination of the three-judge court was on the merits.

In view of the foregoing, it is clear that the instant appeal is squarely within this Court's narrow construction of 28 U.S.C. §1253 and this court should,

as Judge Moore suggested, decide the "real issue" (36a) - appellant's constitutional claims.

In this connection, this court recently affirmed, summarily, a three judge court injunction of a state statute which three dissenting justices believed to be moot since the statute no longer existed when the determination was made.

Buchannan v. Evans, U.S. ,
44 L.W. 3299 (1975). Since the matter involved a school redistricting, the constitutional issues were significant. By its affirmance, this court recognized that the true test is what the District Court does and not what it should have done. Since the three-judge court in Buchannan reached the merits, this court

had proper jurisdiction to summarily affirm. Similarly, in this case, since the three-judge court did reach the merits, which they all acknowledged to be significant, jurisdiction can and should be exercised.

The State Statute Challenged:

The State Statute challenged in this action is Section 90 of the Judiciary Law of the State of New York (Appendix D, 124a). As indicated in the dissenting opinion of Judge Weinstein (U.S.D.C.), Article 6, Section 3(a) of the New York State Constitution [McKinney's N.Y. Const. Art.VI, §3(a) (1962)]; and Sections 5501(b) and 5601 of the New York Civil Practice Law and Rules [McKinney's New York Civil Practice Law and Rules §§5501(b) and 5601] are also involved (Appendix E, 130a).

QUESTIONS PRESENTED

In this case, an attorney has been suspended from the practice of law by the State's intermediate Appellate Court, sitting as a tribunal of original jurisdiction, which did not hear testimony of a single witness, did not permit oral argument to be addressed to it, and gave no explanation for its decision. In doing so, it made a per curiam reversal of a decision contained in the 18 page opinion of a lower court judge sitting as a Referee to hear and report, who evaluated the credibility of the witnesses after conducting seven hearings which produced more than 850 pages of testimony. The attorney has been denied

any state appeal from his suspension, unlike any other professional in the state whose suspension could stand only after a finding on appeal that the suspension was supported by "substantial evidence", and unlike any other litigant who has one appeal as of right from any adverse determination.

The basic question presented to this court is whether the State's constitutional and statutory attorney disciplinary structure which establishes these procedures violates the Fourteenth Amendment rights of attorneys as secured by the United States Constitution.

The specific questions raised by the State's constitutional and statutory attorney disciplinary structure are as

follows:

1. Whether it is a violation of Equal Protection for the state to afford all professionals other than attorneys a full adversarial trial before a tribunal of original jurisdiction while permitting attorneys to be disciplined by a tribunal of original jurisdiction which does not hear the testimony of any witnesses, does not permit oral argument to be addressed to it, and which need not provide any factual findings or explanation for its decision.

2. Whether it is a violation of Equal Protection for a state to afford all professionals other than attorneys the right to have disciplinary action taken by a tribunal of original jurisdic-

tion after a full adversarial hearing, which may be challenged on appeal and upheld only if supported by substantial evidence, while affording attorneys no appellate review of a disciplinary decision taken by a tribunal of original jurisdiction which has not afforded the attorney a full adversarial hearing.

3. Whether it is a violation of Equal Protection for a state to afford one appeal as of right to all litigants other than attorneys.

4. Whether the Due Process Clause of the Fourteenth Amendment requires that attorneys be afforded a full adversarial trial by the tribunal of original jurisdiction.

5. Whether the Due Process

Clause of the Fourteenth Amendment requires that attorneys be given one appeal as of right from adverse disciplinary action when they have not been afforded a full adversarial hearing by the tribunal of original jurisdiction.

FACTS

Appellant has been continually engaged in the practice of law in New York State since June 11, 1959. During that time, he has had an unblemished record with the exception of the disciplinary proceeding which is the subject of this action.

This disciplinary proceeding was commenced on October 4, 1972, by the New York State's Supreme Court, Appellate Division, which appointed the Hon. Albert McGrover, a Justice of the Supreme Court, Kings County, as a Referee to hear and report to it in connection with certain charges. The charges had initially been investigated by the Judicial Inquiry of the Kings County Bar Association and were

the result of an original complaint filed by Roberta Evans, who had been the appellant's intimate acquaintance for many years.

At the initial hearings conducted by the Judicial Inquiry, Mrs. Evans stated that the appellant had converted more than Seventeen Thousand (\$17,000.00) Dollars that she had entrusted to him to protect from any claim by her husband with whom a divorce action was pending. However, at the subsequent hearings before Mr. Justice McGrover, Mrs. Evans recanted her prior testimony and admitted that she had lied on numerous occasions before the Judicial Inquiry because she wanted to get back her money and because she almost had a nervous

breakdown because she didn't get her money back when she was supposed to. In this connection, she testified in detail that she had authorized the appellant to use the money both to invest for her and to pay his own debts. She also testified before Justice McGrover that during this period of time she and the appellant were discussing the possibility of marriage.

On the basis of Mrs. Evans' recantations, and on the basis of seven (7) days of hearings which produced an extensive record, consisting of more than 850 pages, Mr. Justice McGrover prepared a detailed 18 page report dated June 12, 1973 (Appendix H, 151a), in which he concluded that none of the charges

against the appellant had been sustained. On January 28, 1974, the Appellate Division, on the basis of the record alone, in a per curiam opinion, rejected the Referee's report, without stating any reasons for its rejection, and suspended appellant from the practice of law for a three (3) year period commencing March 1, 1974. The Court's opinion made no detailed factual findings but rather, in conclusory fashion, stated: "In our opinion, contrary to the report, all three charges are fully sustained by the proof." Appellant was not afforded an opportunity to present oral argument or evidence in the Appellate Division; that court acted merely on the papers submitted.

Having obtained a stay of the order of suspension, appellant made an application to the Appellate Division for reargument or for permission to appeal to the New York Court of Appeals. That motion was denied on March 21, 1974.

Thereafter, on March 27, 1974, the appellant filed a Notice of Motion in the New York Court of Appeals seeking leave to appeal to that court from the Appellate Division's order of suspension. The application for leave to appeal was based upon the following grounds:

"A. Respondent-Appellant [Plaintiff] was deprived of due process of law under the Federal and State Constitutions in that the order of suspension was based upon the recanted testimony of an admitted perjured witness; and

B. The Appellate Division, Second Judicial Department, erred in reversing the findings of fact and conclusions arrived at by the Learned Justice who saw the witnesses and heard the testimony and concluded that none of the charges against [Plaintiff] had been sustained by the evidence; and

C. That as a matter of law, the charges against the Respondent-Appellant [Plaintiff] have not been established."

Appellant's motion was denied by the New York Court of Appeals on May 9, 1974.

The reason why appellant had to proceed by application for leave to appeal to the Court of Appeals rather than by direct appeal as of right is because the New York State Procedure for Disciplining Attorneys does not provide an attorney aggrieved by a suspension or disbarment

order an absolute right of appeal. It is not disputed that every other litigant within the State and especially professionals who are disciplined do have at least one appeal as of right from any determination adverse to them. This appeal, granted to all others, from the tribunal of original jurisdiction, is on all questions of law and fact. The application of the New York State structure thus prevented appellant from obtaining, as of right, appellate review of the Appellate Divison's suspension order.

While the appellant may have had a right to appeal to the New York State Court of Appeals on certain constitutional issues, his appeal would have been limited, because the New York

State Constitution permits the New York State Court of Appeals to review only questions of law and not questions of fact (see, New York State Constitution, Article 6, Section 3, Subdivision a). Thus, appellant had no right of appeal on the facts and non-constitutional issues.

Thereafter, while the Appellate Division had sub judice a motion to fix the commencement date of appellant's suspension, appellant instituted this proceeding pursuant to 42 U.S.C. §1983 to invalidate his suspension by the Appellate Division. The basis of his claim was that unlike any other litigant in the State of New York, he had no right of appeal from the original judicial deter-

mination to suspend him.

Simultaneously with the institution of this proceeding, appellant brought on a motion for a preliminary injunction by order to show cause signed by the Hon. Jack B. Weinstein on June 25, 1974. This order to show cause contained a stipulation between the parties which had the effect of staying appellant's suspension until September 11, 1974. This stipulation was extended by agreement of the parties pending the court's determination on appellant's application for the convening of a three judge court.

By order dated October 23, 1974, the Hon. Jack B. Weinstein determined that appellant's claim was to be heard and determined by a three judge court. This order also stayed appellant's suspension

until the three judge court determines the validity of appellant's claim.

At the present time, appellant's sole source of income is from the practice of law. He requires this income to support his own family as well as the family of his brother. His brother was killed in an automobile accident in September, 1973, and was survived by his wife, as well as two young children, ages 12 1/2 and 14. The appellant's economic burden is particularly acute because he has no money saved since he had to pay substantial medical bills in connection with the treatment of his mother who recently died of cancer.

To fully appreciate the factual background and the New York State Statu-

tory procedures for disciplining attorneys (as compared to other professionals and other litigants) which are being challenged in this proceeding, one need only review the language of Judge Weinstein contained in his opinion convening a three judge court below:

"Mr. Mildner argues that attorneys, unlike any other New York professionals, have no appeal as of right from an original determination disciplining them. Other professionals can appeal from an order of discipline to the Appellate Division as of right. Lawyers, since they are disciplined by the Appellate Division in the first instance, have only a limited right of appeal from that original determination. Section 90 of the New York Judiciary Law deals with appeals in such proceedings, providing in relevant part:

'8. Any petitioner or respondent in a disciplinary proceeding against an attorney or counsellor-at-law under this section, including a bar association or any other corporation or association, shall have the right to appeal to the court of appeals from a final order of any appellate division in such proceedings upon questions of law involved therein, subject to the limitations prescribed by article six, section seven, of the constitution of this state.'

Apparently, following a suspension order from the Appellate Division, which acts as a court of original jurisdiction, attorneys involved in disciplinary proceedings are afforded an appeal as of right to the New York Court of Appeals only with respect to issues which the Court of Appeals finds directly involve the construction of the state or federal constitutions. See, New York Constitution,

Article 6, §3 and CPLR 5501 et seq. and 5601 et seq. Whether the appeal is taken as of right or permission to appeal is granted by the Appellate Division or the Court of Appeals, it is alleged that only questions of law are reviewed. Id." (Appendix B, 113a-115a.)

It must be recognized that this defective procedure with regard to the right of appeal is coupled with one which permits the Appellate Division, the only court with the initial power to suspend or disbar an attorney, without oral argument or the benefit of any hearings, to summarily reverse the findings of its own Referee who heard witnesses and arguments of counsel. Since the Appellate Division is the only court with the power to discipline, such procedures constitute a denial of basic due process

and equal protection and raise, as all judges below acknowledged, serious questions going to the heart of the rights of appellant and all other New York State lawyers who practice their profession to earn their living.

STATEMENT OF THE REASONS
WHY THE QUESTIONS PRESENTED
ARE SO SUBSTANTIAL AS TO
REQUIRE PLENARY CONSIDERATION.

As noted by all three of the judges below, this case involves "... serious procedural and substantive issues... ." (33a.) The procedure for disciplining an attorney within the State of New York is, of itself, a significant matter. At risk is the livelihood of the individual attorney charged with impropriety. This directly affects his ability to earn a living in the field he has chosen. In this case, the Court is asked to reaffirm that the Due Process and Equal Protection guarantees in the United States Constitution apply to attorneys who are subjected to discipli-

nary proceedings to the same extent as other citizens.

The dissenting opinion of Judge Weinstein so clearly states the issues and enunciates the reasons why New York State's disciplinary proceedings are constitutionally infirm that one is tempted to simply reproduce that opinion at length herein. Judge Weinstein grasped the critical arguments presented by appellant as well as those presented by the plaintiffs in the consolidated cases.

This Court has held that an attorney is entitled to protection of his fundamental constitutional rights at all stages of a disciplinary proceeding.

Spevack v. Klein, 385 U.S. 511, 87 Sup. Ct. 625 (1968); In Re Ruffalo, 390 U.S.

544, 88 Sup. Ct. 1222 (1968). Indeed, this Court has even characterized disbarment proceedings as being "of a quasi-criminal nature." In Re Ruffalo, supra.

This case presents for review whether the New York State procedure for disciplining attorneys, which effectively emasculates the protections this court has enunciated for attorneys in disciplinary proceedings, should be allowed to stand. It is claimed that that procedure deprives appellant of both the equal protection and due process of law.

I. Equal Protection.

This Court has recently held, in invalidating a requirement that tenants

post a double indemnity bond as a condition of appellate review, that:

"When an appeal is afforded...it cannot be granted to some litigants and capriciously and arbitrarily denied to others without violating the Equal Protection Clause."

Lindsey v. Normet, 405 U.S. 56, 77, 92 Sup. Ct. 862, 876 (1972).

The Lindsey case represents an amplification of a consistent line of criminal and quasi-criminal cases in which this Court has required the state to alter their procedures so as to insure individual criminal defendants, like all other defendants, a right to appellate review of their convictions. See, e.g., Griffith v. Illinois, 351 U.S. 12, 76 Sup. Ct. 585 (1956).

As recognized by all of the members of the three-judge court, New York State treats attorneys in a manner different from all other litigants and professionals insofar as their right to appellate review of disciplinary proceedings is concerned. In fact, the Attorney General, representing the defendants in this action, does not dispute this circumstance. Thus, the question of whether this differential treatment denies Equal Protection is raised. This depends on whether there is a rational basis for distinguishing between attorneys and other litigants.

It is clear that Judges Neaher and Moore both recognized the applicability of the above general rules. In

fact, Judge Neaher specifically stated that the test to be applied in determining the Equal Protection claims was whether the distinction was based "... upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." (22a; footnote and citation omitted.)

Given this explicit recognition by Judge Neaher, and the similar recognition by Judge Moore, of the seriousness of the constitutional claims involved, it is clear that this court should hear this case with full briefs and oral arguments. This should be done so that this court may confirm that an attorney is en-

titled, as matter of his basic constitutional guarantees, to the same kind of appellate rights as any other professional within the State of New York and as any other litigant who suffers an adverse determination. It is critical to remember that there is no dispute as to the difference in classifications in the within case. Quite simply, attorneys, unlike all other litigants who suffer an adverse determination, and unlike all other professionals who are subject to disciplinary proceedings, have no right of appeal on all questions of law and fact. One of the three judges below held that this was a denial of an attorney's guarantee of the equal protection of the law. Two of the other judges in-

licated that they felt that the questions were of a serious nature and ought to be reviewed by this Court. This, in and of itself, ought to be sufficient reason why this Court should note jurisdiction and hear for itself, on the basis of full briefs and oral arguments, the parties' positions. It is submitted that it is a rare case where the judges who have heard the case themselves recognize the seriousness of the questions and at least two of them urge an appeal to this Court.

Moreover, analysis of Judge Neaher's conclusion that the New York statutory scheme is constitutional reveals that his sole basis for this conclusion was the fact that the New York

State legislature deemed the disciplinary scheme appropriate (21a-24a). When compared with the test acknowledged by Judge Neaher, the failure to make a proper determination of the issue raised is clear. This error is significant and further warrants the exercise of jurisdiction by this Court.

II. Due Process of Law

The second significant reason why this Court should entertain jurisdiction is that the procedure pursuant to which appellant was suspended deprived him of due process of law. Here, it should be recalled that appellant was first charged with professional improprieties by the Judicial Inquiry. Thereafter, the charges were referred by the Appellate Division to an official Referee. The Referee heard over 850 pages of testimony and rendered an 18 page report exonerating appellant of the charges. The Appellate Division, on the basis of papers alone, without the benefit of oral argument or the taking of testimony before it, refused to affirm the referee's

report, and directed the suspension of appellant for three (3) years, without giving any reasons for its determination.

Judge Weinstein stated appellant's position quite well in his dissenting opinion:

"In attorney disciplinary proceedings due process requires a hearing by and before the tribunal with the power to decide and punish. The Supreme Court has found such a hearing to be an important 'trial right' without which such fundamental due process guarantees as confrontation and a fair hearing would be devoid of substance. Barber v. Page 390 U.S. 719, 721, 88 S. Ct. 1318, 1320, 20 L. Ed. 2d 255 (1968); Berger v. California, 393 U.S. 314, 315, 89 S.Ct. 540, 541, 21 L. Ed. 2d 508 (1969); Williams v. State of Maryland, 375 F. Supp. 745, 756-757 (D. Md. 1974)." (83a.)

The majority below attempted to justify its conclusion that no full and complete

hearing, oral argument or written reasons are required by indicating that disbarment proceedings are something akin to an "inquest" (25a). In doing so, the majority rejected (17a) this Court's finding that disciplinary proceedings are of a quasi-criminal nature and, in effect, ignored this Court's determination in In Re Ruffalo, 390 U.S. 544 (1968).

Judge Neaher's opinion did not contain any explanation of his determination to ignore this Court's pronouncements in In Re Ruffalo, supra. If this Court does not note jurisdiction in this case and hear full argument, its action might be considered a determination that a new and distinct characterization of attorney disciplinary proceed-

ings exists. If this Court wishes to consider recharacterizing and to change the nature of such disciplinary proceedings, it should hear full and complete argument on the matter rather than merely refusing to note jurisdiction, thereby allowing such a decision as the one below to stand. Thus, this Court should take this case to reaffirm that attorney disciplinary proceedings are indeed the kind of proceedings in which an attorney is an accused party and therefore entitled to due process of the law, including a full and complete hearing before the tribunal which may punish him, the ability to present oral argument to that tribunal and the right to obtain the reasons for any action taken.

CONCLUSION

For the foregoing reasons, this Court should accept jurisdiction of this appeal and reverse the decision below.

Respectfully submitted,

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